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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 911, 912, 913

CHICAGO & EASTERN ILLINOIS RAIROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DeRAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION; AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONERS

TO

BRIEF OF GRAND TRUNK WESTERN RAILROAD COMPANY AND TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

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SUBJECT MATTER INDEX.

Alphabetical Table of Cases Cited.

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to

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MAY IT PLEASE THE COURT:

The respondents, Western Indiana* and Erie, have filed no brief in opposition to the petition herein. The only brief filed is that on behalf of the respondents, Grand

*The same short terms are used in this brief as those used in the petition and supporting brief.

Trunk and Monon (hereinafter referred to as "respondents"), to which this is a reply.

While there are some inaccurate statements in respondents' brief under "Questions Presented" (pp. 2-4), in the interest of brevity this reply brief is limited to answering the arguments made by respondents insofar as they are pertinent to the petition for certiorari.

ARGUMENT.

POINT I (Respondents' Brief, pp. 8-13).

In their attempt to avoid Point I in petitioners' supporting brief and the first reason for the allowance of the writ assigned in the petition, respondents have not challenged the fact that the theory upon which the entire decision of the Circuit Court is predicated was original with that Court.

Instead, they suggest a distinction between the word "point" as used by Mr. Justice Roberts in his opinion in *LeTulle* v. *Scofield*, 308 U. S. 415, and the word "reason" used by respondents to denote the basis or foundation of a court's decision.

In the opinion of this Court in the *LeTulle* case, reference is made (p. 418) to the opinion of the Circuit Court of Appeals, in which the latter court said:

> "We find a *reason* for reversing the judgment which has not been argued." (Italics supplied.)

This Court granted certiorari because, as stated by Mr. Justice Roberts (p. 416), the Circuit Court "had based its decision on a *point* not presented or argued by the litigants, * * *" (Italics supplied). There is no difference between these terms as used in this sense; they are synonymous.

Whether the theory which the Circuit Court originated and upon which it decided this case be called a "point" or a "reason," it is the foundation of that Court's decision. Accordingly, respondents' effort to distinguish the *LeTulle* case from the instant case on this ground is without merit.

Respondents' attempt to refute petitioners' contention that the theory of the Circuit Court was patently erroneous is also without merit. Whether or not the 1882 Intertenant Agrement was interrelated with the five supplemental leases bearing the same date, and whether that agreement might for any purpose be construed together with said five leases, is entirely immaterial.

The correctness of the principles announced by the Supreme Court of Illinois in the cases cited by respondents (Brief, p. 10) is undisputed; we submit, however, that such principles are inapplicable here.

The inquiry in this case, under the Circuit Court's theory that paragraph 37 of the 1902 Lease was controlling, is confined to determining whether the reference in said paragraph 37 to "said existing leases" does or does not include the 1882 Agreement. The principle that contemporaneous instruments may, for some purposes, be construed together does not change the character or identity of either of such instruments.

The fact is that the parties to the 1902 Lease, in paragraph 3 thereof, carefully and meticulously enumerated each of "the existing leases" and omitted any reference whatsoever to the 1882 Agrement (R. 530-531).

Furthermore, the contention now made by these respondents that the 1882 Agreement should be considered as part of the leases referred to in paragraph 37 is directly contrary to the contention made by these same respondents in their brief filed in the Circuit Court (pp. 55-56):

> "Moreover, the references in the Joint Supplemental Lease of 1902 to prior contracts between the parties were, with one exception, *limited to prior leases* (T. 530); the 1882 Intertenant Agreement was *nowhere mentioned.*" (Italics supplied in part.)

Without any further attempt to justify the Circuit Court's decision based upon its construction of paragraph 37, respondents next argue (Brief, p. 10) that the validity of the ultimate conclusion by the Circuit Court on the principal question involved—that paragraph 33 of the 1902 Lease did not supersede paragraph 6th of the 1882 Agreement—is not dependent upon the erroneous and original theory of the Court because of respondents' contention that paragraph 33 is not in conflict with paragraph 6th.

Respondents further contend (Brief, p. 10) that paragraph 33 of the 1902 Lease did not provide a *definition* of the expenses distributable on a wheelage basis, but merely listed such expenses by categories.

These contentions, however, clearly go to the merits of the case, which we deem improper to answer at this time. It is sufficient to point out that these assertions by respondents are directly contrary to the findings of fact made by the District Court upon the stipulation of facts and the supplemental stipulation of facts covering approximately 189 pages of the record, which findings the Circuit Court did not set aside or even refer to. Respondents have made no attempt either in the Circuit Court or in their brief in this Court to point out wherein such findings are not supported by the stipulated facts.

The District Court expressly found (Appendix to Petition, p. 29) that paragraph 33 of the 1902 Lease, as well as paragraph Ninth of the 1902 Agreement,

> "relate to and cover the same subject matter and are *inconsistent* with the provisions of paragraphs 5th and 6th of the Inter-Tenant Agreement of November 1, 1882." (Italics supplied.)

In view of this finding of fact, respondents' contention that paragraph 33 is not in conflict with paragraph 6th is completely unjustified.

The District Court further found (Appendix to Petition, p. 29):

> "The six parties to the Preliminary Proprietary Agreement of January 16, 1902, and to the Joint Supplemental Lease of July 1, 1902, in executing said Agreement and Lease, *provided a new definition of the expenses of the Western Indiana* for which it was to be reimbursed directly by the five tenant owners." (Italics supplied.)

This finding disposes of respondents' contention that paragraph 33 does not provide any definition of expenses.

Respondents' statement in their brief (p. 10) that paragraph 33 "presumably was intended * * * to furnish the mortgage trustee with additional security" is pure speculation and unsupported by the record. Moreover, it is unsound because almost identical language was carefully inserted in paragraph Ninth of the 1902 Agreement (R. 516) which preceded the 1902 Lease and to which the mortgage trustee was not a party. Nowhere in their brief, however, have respondents referred to the 1902 Agreement, which, throughout this litigation, they have assiduously endeavored to avoid and to minimize.

On the contrary, they state (Brief, p. 11) that the 1882 Agreement is the only contract between the five tenant owners which "prescribes the necessary basis for the conduct of the joint enterprise." This statement is made despite the fact that the 1902 Agreement (R. 509-518) is an agreement of precisely the same character as the 1882 Agreement, that it embodies in paragraph Ninth thereof a new definition of expenses payable on a wheelage basis in almost identical language as that in paragraph 33, that it is the foundation of paragraph 33, and that it was executed by the same parties acting in precisely the same capacities as when they made the 1882 Agreement. The mortgage trustee was not a party to either the 1882 Agreement or the 1902 Agreement (R. 196-197, 509).

Respondents' statement that under petitioners' contention more than $455,000 annual expenses of Western Indiana would be entirely unprovided for, and that no reason has been adduced to support the conclusion that the parties to the 1902 Lease intended to limit the wheelage expenses of Western Indiana, undoubtedly seeks to convey the impression that Western Indiana is dependent upon reimbursement by its tenant owners for all of its expenses, and that if it is not so reimbursed the result would be disastrous. While this argument is addressed to the merits and therefore not properly answerable at this stage, petitioners deem it necessary to point out that respondents have omitted to state that Western Indiana receives annually fixed rentals amounting to at least $499,000 (Petition, p. 4), which are more than ample to defray all of the expenses for which respondents seek to impose liability upon the five tenant owners on a wheelage basis.

Respondents' statement (Brief, p. 12) that the question whether paragraph 33 of the 1902 Lease superseded paragraph 6th of the 1882 Agreement has been twice considered by the Circuit Court, is not only inaccurate but is also an evident attempt to create the impression that the cumulative effect of two decisions upon that question should deter this Court from granting the writ in this case.

In the so-called capital stock tax case (*In re Chicago & E. I. Ry. Co.*, 94 F. (2d) 296), in which respondents state the question was first considered, the only issue presented to the Circuit Court for decision was whether the single expense item there involved, viz., Illinois capital stock tax, was chargeable on a wheelage basis under paragraph 6th of the 1882 Agreement. The Court held that such tax was so chargeable and that it was a property tax. Being a property tax, the tax came within the scope of the expense provisions in all the leases, as well as within those

of paragraph 6th of the 1882 Agreement. The fact that the Circuit Court in the case at bar did not consider its decision in the prior case as within the doctrines of either *res judicata* or *stare decisis* speaks eloquently as to the Court's own view of the matter.

The question as to which is the controlling provision was *not* decided by the Circuit Court in the capital stock tax case but *was* decided by that Court for the first time in the instant case, the very case here sought to be reviewed.

Respondents state (Brief, p. 13) that according to the newly discovered evidence proffered by petitioners, the parties were advised by counsel that "the desired end could not be carried out, and the notion was definitely abandoned." The first part of their sentence shows that by "the desired end" respondents refer to the cancellation of existing agreements and the execution of the new agreement covering the sharing of expenses authorized by the resolution (R. 780) unanimously adopted in 1900 by the representatives of the tenant owners. It is the new agreement as to the division of expenses which respondents would have this Court believe was abandoned on advice of counsel.

The record reference given by respondents (R. 916-17), however, instead of substantiating this assertion, is only to a letter written subsequent to the execution of said new agreement, viz., the 1902 Preliminary Proprietary Agreement, and relates only to the efforts of the then counsel for Western Indiana to draft a lease in accordance with and to effectuate the terms of said 1902 Agreement. This letter dealt solely with the mechanical difficulties encountered in incorporating into one document all of the provisions of the earlier leases, and, contrary to respondents' assertion, clearly shows that said counsel was endeavoring to carry out the plan and the intent expressed and provided in the 1902 Agreement.

POINT II (Respondents' Brief, p. 13).

Respondents (Brief, p. 13) urge that the second reason for granting the writ "is wholly untenable" because, while the Circuit Court in its March 17, 1943 opinion said (R. 719, Appendix, p. 9):

> "Consequently there is presented only the effect of the 1902 Agreement on existing leases.",

respondents assert that the question posed by the Court in the above statement was entirely different from that found in the foregoing language of the Court.

But paragraph 37, which the Court held controlling, refers only to "said existing leases," being only those previously enumerated in paragraph 3 of the same 1902 Lease under the caption "The Existing Leases" (the 1882 Agreement not being listed) (R. 530-531).

It is obvious that if the question had been stated by the Court in the substitutionary form suggested by respondents, it would have been wholly unrelated to the language of paragraph 37 and absolutely incongruous.

The fact remains that the question, which the Circuit Court stated to be the only question presented, was never decided by it.

POINTS III AND IV (PETITION) AND POINT III (BRIEF) (RESPONDENTS' BRIEF, PP. 14-15).

There is nothing stated under this Point in respondents' brief which refutes the matters set forth by petitioners in support of this reason for the allowance of the writ.

We wish, however, to call this Court's attention to the inaccuracy in respondents' statement (Brief, p. 14) that paragraph 5th of the 1882 Agreement did not specify the

method of distributing Western Indiana's expenses on a wheelage basis. This paragraph (Appendix, Respondents' Brief, p. 19) specifically provided a formula for determining the proportion of each party liable for such expenses. In addition, it specifically provided that as to the maintenance and operating expenses of the passenger station, including lead tracks, such expenses should be divided in proportion only to the number of passenger cars and engines entering the same. Furthermore, comparison of paragraph 5th of the 1882 Agreement with those provisions of paragraph 33 providing the formula or method for determining the proportion payable by each tenant owner (Appendix, Respondents' Brief, p. 22) shows that the provisions in paragraph 33 on this subject are different from and inconsistent with those on the same subject matter contained in paragraph 5th.

It is true that the particular provisions in paragraph 33, which deal with distribution by sections, in no way changed the definition of "working expenses" in paragraph 6th of the 1882 Agreement. This is obvious, for those provisions had nothing to do with the definition of expenses. However, the portion of paragraph 33 which precedes the provisions as to sectional distribution *does* contain the definition of expenses payable upon a wheelage basis. It is that portion which petitioners contend superseded and abrogated the provisions of paragraph 6th. Where the definition of expenses in paragraph 6th "drew the line" between capital expenses and all other expenses, the definition in paragraph 33 equally "draws the line" between common property expenses of Western Indiana and all its other expenses not of that character.

The reason why the Circuit Court did not hold in the Erie appeal (CCA No. 7878) that paragraph 6th was affected by paragraph 33 was because that question was not presented. Both parties to that appeal were in agreement

that paragraph 33 was controlling upon the question there presented for determination. However, it should be borne in mind that the subject matter of that inquiry, viz.,—the proper *method* of distributing certain wheelage expenses among the parties liable therefor—is the same subject matter as that of paragraph 5th of the 1882 Agreement.

It is extremely important to note that paragraph 33 of the 1902 Lease covers, in a single paragraph, both subject matters previously covered by paragraphs 6th and 5th of the 1882 Agreement, to-wit: (1) the definition of expenses distributable on a wheelage basis, and (2) the method of distributing the same.

Point V (Petition) and Point IV (Brief) (Respondents' Brief, p. 15).

In a single paragraph (Brief, p. 15) respondents attempt to answer the reason for allowing the writ which relates to the questions left undecided by the Circuit Court. They seek to minimize the importance of these questions, but, as the record shows, said questions involve very large annual sums payable, under the Circuit Court's decision, for approximately 950 more years. To illustrate—the difference between the maximum and minimum amounts to be charged as to separate railroad operations, under the various conflicting views of the parties, was $117,256.32 for 1937 (R. 351-52). It is inevitable that further litigation will follow if these questions are not decided.

The statement in respondents' brief (p. 15) "that we know of no authority for the proposition that a decision of an intermediate appellate court should be reversed for any such reason as that suggested" does not correctly reflect any "proposition" in the petition or supporting brief. Petitioners did not either in their petition or in their

supporting brief suggest that the decision of the Circuit Court "should be reversed" because of these undecided questions. Petitioners merely requested "this Court to exercise its power of supervision and allow the writ so that these questions will be completely and finally settled." (Petition, p. 23.)

POINT VI (Petition) and POINT V (Brief)

(Respondents' Brief, p. 16).

Under this point respondents, rather than denying the importance of this case, have attempted to avoid it, probably because of their own recognition of such importance as shown in the supporting brief (p. 28). Instead, they assert that only questions of substantive law of Illinois are present.

Whether or not the Circuit Court recognized the substantive rule of law prevailing in Illinois is not clear from its opinions. It is clear, however, that that Court defeated the inevitable application of such rule in the case at bar by adopting its own original and erroneous theory. Examination of the Circuit Court's opinions reveals that it did not hold said rule of law inapplicable for the reason stated by respondents (Brief, p. 16) viz., that "under no theory could paragraph 33 of the 1902 Lease be said to be in conflict with paragraph 6th of the 1882 Intertenant Agreement."

Conclusion.

It is respectfully submitted that respondents have not shown any reason why the writ of certiorari should not be granted.

Respectfully submitted,

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